Supreme Court, U.S.
FILED
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(2)

No. 96-1287

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH A. IMPARATO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether a remedial order issued by the Department of Energy, which held petitioner jointly and severally liable for petroleum price overcharges with a corporation that petitioner solely owned and controlled, exceeded the agency's authority or is based upon findings which are not supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 95 F.3d 1126. The opinion and order of the district court (Pet. App. 27-34) are unreported. The order of the Federal Energy Regulatory Commission (Pet. App. 35-43) is reported at 65 F.E.R.C. (CCH) ¶ 61,022. The Department of Energy's remedial order is reported at 17 D.O.E. (CCH) ¶ 83,011 (1988).

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1996. A petition for rehearing was denied on November 18, 1996. Pet. App. 44-45. The petition for a writ of certiorari was filed on February

13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* (1982), which incorporated by reference portions of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1976), required the President to promulgate regulations providing for the mandatory allocation of crude oil, in amounts and at prices specified in the regulations. The President's authority under those statutes expired in 1981. Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, § 461, 89 Stat. 955. A savings provision, however, preserved enforcement proceedings based on acts committed or liability incurred prior to the expiration date. *Ibid.*

The regulations controlling the allocation and price of crude oil were enforced by the Department of Energy (DOE) and its predecessor agencies through the issuance of remedial orders. 42 U.S.C. 7193(a); see generally *Phoenix Petroleum Co.* v. *FERC*, 95 F.3d 1555, 1560 (Fed. Cir. 1996). Pursuant to Section 503(c) of the Department of Energy Organization Act (DEOA), a DOE remedial order is reviewable by the Federal Energy Regulatory Commission (FERC), which may affirm, modify or vacate the order. 42 U.S.C. 7193(c). FERC's order constitutes final agency action that is subject to judicial review in federal district court. 42 U.S.C. 7192, 7193(c). Before April 29, 1993, district court decisions in cases arising under the ESA and the EPAA were appealable to the Temporary Emergency Court of Appeals (TECA). Economic Stabilization Act Amendments of 1971 (ESAA), Pub. L. No. 92-210, § 2, 85 Stat. 749

(ESA § 211(b)(2)). Under Section 211(d)(1) of the ESA, a remedial order could not "be enjoined or set aside * * * unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence." *Ibid.* After TECA was abolished, appellate jurisdiction to review agency action under the EPAA was transferred to the United States Court of Appeals for the Federal Circuit. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 102, 106 Stat. 4506-4507; see also 28 U.S.C. 1295(a)(11)-(12). The Federal Circuit has held that it applies "the standard of review applied by TECA," and, with "great deference" to DOE's determinations, it will "approve the DOE decision if there is a rational basis for it." *Phoenix Petroleum*, 95 F.3d at 1567.

2. On May 24, 1984, the Economic Regulatory Administration (ERA) in DOE issued a proposed remedial order alleging that, during the period from June 1979 through August 1980, Houston Oil & Refining Co. (Houston), a corporation solely owned and operated by petitioner, resold in excess of 50 million barrels of crude oil in transactions that had no economic function other than to increase the price of crude oil in violation of DOE's anti-layering regulation, 10 C.F.R. 212.186 (1980). C.A. App. 55-80. The proposed remedial order sought restitution of overcharges in the amount of $57,989,772.44, which represented Houston's gross profits received from the illegal layering, plus applicable interest. *Id.* at 74.

On February 28, 1985, ERA filed a motion with DOE's Office of Hearings and Appeals (OHA) seeking to add petitioner as a party to the enforcement proceedings. ERA based its motion on petitioner's "personal involvement in [Houston's] allegedly illegal con-

duct" and on his role as "the 'central figure' behind the alleged regulatory violations." *Houston Oil and Refining, Inc.*, 13 D.O.E. (CCH) ¶ 83,013, at 86,060 (June 4, 1985). ERA asserted that petitioner, who was the "100% owner, chairman of the board, and president" of Houston, "dominated and controlled" Houston's illegal activity. *Id.* at 86,061. ERA also relied on the fact that petitioner signed the "Crude Oil Reseller Self-Reporting Forms," which were filed each month with DOE and set forth detailed information on Houston's prices, costs and compliance with the pricing regulations. ERA further reasoned that petitioner had admitted that he was "completely familiar" with the allegedly illegal transactions. *Ibid.*

On April 29, 1988, OHA issued a remedial order finding that Houston and petitioner violated the anti-layering regulation and were jointly and severally liable for making restitution in the amount of $57,989,772.44, plus interest. *Houston Oil and Refining, Inc.*, 17 D.O.E. (CCH) ¶ 83,011, at 86,123 (Apr. 29, 1988). OHA concluded that its "authority to hold corporate officers individually liable is grounded in the agency's broad authority to order restitution" under Section 209 of the ESA, as incorporated by Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1) (1982). 17 D.O.E. (CCH) ¶ 83,001, at 86,132.[1] OHA explained that

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[1] Section 209 provided:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices[.] * * * In addition to

liability may be imposed on an individual under a "central figure" theory of liability "if it can be shown that: (1) he exercised personal control of the firm's regulated operations or participated in the transactions in which the overcharges occurred; and (2) he personally benefitted from the overcharges." *Id.* at 86,133. OHA observed that, "[u]nlike the grounds for imposing liability by 'piercing the corporate veil,' under this 'central figure' theory the corporate officer or director is liable as an actor, not as an owner." *Ibid.* Based on its review of the record, OHA found that, because petitioner "played a central role in causing the regulatory violations," he was responsible for refunding the overcharges. *Id.* at 86,134.

FERC affirmed the remedial order. Pet. App. 35-43. With respect to the imposition of personal liability, the Commission concluded that petitioner "had not put forward or argued any equities that might mitigate against individual liability." *Id.* at 41.

3. The United States District Court for the Southern District of Texas sustained FERC's order. Pet. App. 27-34. The district court held that 42 U.S.C. 7193 authorized DOE "to order appropriate relief," including the imposition of personal liability, for violations of DOE's price control regulations. *Id.* at 30. The court explained that "personal liability may be imposed when 'the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws.'" *Ibid.*

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such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

ESAA § 2, 85 Stat. 748.

(quoting *Citronelle-Mobile Gathering, Inc.* v. *Herrington*, 826 F.2d 16, 25 (Temp. Emer. Ct. App.), cert. denied, 484 U.S. 943 (1987)). The court also concluded that petitioner's "argument that state corporate law should apply is without merit because federal law governs questions involving rights of the United States which arise under nationwide federal programs." *Id.* at 32 (citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)). After determining that DOE had not shifted the burden of proof to petitioner (*ibid.*), the court concluded that "[t]he agency's findings that [petitioner] was the central figure in the regulatory violations, personally benefitted from the overcharges, and is personally responsible for restitution are supported by substantial evidence." *Id.* at 33.[2]

4. The court of appeals affirmed. Pet. App. 1-26. The court of appeals held that DOE properly imposed personal liability on petitioner "because of his personal involvement in Houston's illegal conduct." *Id.* at 12.[3] The court concluded that "DOE does have statutory authority to impose liability upon a 'central figure' such as [petitioner]," explaining that Section 503(a) of DEOA, 42 U.S.C. 7193(a), "expressly grant[s] DOE the authority to enforce the

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[2] The court also upheld DOE's findings as to Houston's liability and rejected petitioner's constitutional challenges to the remedial order and the anti-layering regulation. Pet. App. 31-33.

[3] The court also rejected petitioner's arguments that the Fifth Circuit, rather than the Federal Circuit, had jurisdiction over petitioner's appeal and that DOE's remedial order was unconstitutional. Pet. App. 6-7, 9-12, 19-20. Petitioner does not raise those issues before this Court.

EPAA/ESA by issuing [a remedial order]." Pet. App. 18.

The court also rejected petitioner's argument that "the central figure theory is dependent upon 'federal common law' principles rejected by" this Court in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). Pet. App. 19. The court reasoned that *O'Melveny & Myers* involved the federal government's assertion of "*state* causes of action," while this case involves "a DOE agency action undertaken pursuant to one federal law, the [DEOA], in order to enforce federal regulations issued under another federal law, the EPAA/ESA." *Ibid.*

The court then turned to the imposition of personal liability in this case. It first observed that TECA's precedents "conditioned central figure liability on two findings: (1) the individual must be found to have caused a violation; and (2) under the circumstances and equities of the case, it is equitable to impose liability." Pet. App. 21. Applying those standards, the court observed that petitioner did not challenge "that he was a central figure in Houston's overcharges." *Id.* at 22. Instead, petitioner argued that DOE improperly shifted to him the burden of proving that liability would be inequitable by inferring from petitioner's 100% ownership of Houston that he personally benefitted from the overcharges. The court rejected that argument:

> We agree that DOE made a *prima facie* showing that [petitioner] personally benefitted from the overcharges. First, * * * almost immediately after Houston was organized, it began engaging in transactions in violation of the layering regulation. Secondly, Houston has not challenged the

> amount of alleged violations or the manner in which the amount was calculated. * * * Lastly, and most importantly, the record indicates that [petitioner] was the president and 100% owner of Houston during the period of overcharges.

Id. at 24 (internal citations, brackets and quotation marks omitted). Based on the evidence that petitioner's "solely owned corporation collected almost $58 million in overcharges," and the lack of any "evidence as to where those funds went," the court concluded that "[t]he inescapable inference is that [petitioner] personally benefitted from the overcharges." *Ibid.* It reasoned that if the unlawful overcharges remained in petitioner's corporation he "would have directly benefitted by the increased value of the corporation," and that petitioner similarly would have benefitted if the funds had been distributed to him or others at his behest. *Id.* at 24-25. Thus, the court concluded, "[t]here was no [burden] shifting; [petitioner] simply failed to defend against the government's evidence." *Id.* at 25 (quoting *MAPCO Int'l Inc.* v. *FERC*, 993 F.2d 235, 245 (Temp. Emer. Ct. App. 1993)).

ARGUMENT

The court of appeals' decision is correct, and this case does not present any legal issue of continuing importance. Accordingly, review by this Court is not warranted.

1. The statutory provisions and regulations involved here have no continuing force. The government's authority to regulate petroleum prices under the EPAA expired on September 30, 1981. EPCA § 461, 89 Stat. 955. There are no remaining administrative proceedings arising under DOE's price

control regulations. There remain three cases before the Federal Circuit involving a DOE remedial order, but none of those cases raises the question presented in this case.

Petitioner argues only that the decision of the court of appeals is wrongly decided. He suggests no reason—and we know of none—why, notwithstanding the winding up of the price-control enforcement program, this case involves an issue of substantial importance warranting this Court's review. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. In any event, the arguments petitioner advances lack merit.

a. The court of appeals correctly followed a consistent line of TECA precedent that upheld the imposition of personal liability on individuals who directly participated in price control regulatory violations and who personally benefitted from those infractions. See *Citronelle-Mobile Gathering, Inc.* v. *Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App.), cert. denied, 484 U.S. 943 (1987); *United States* v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987); *Sauder* v. *Department of Energy*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981); *United States* v. *Arizona Fuels Corp.*, 638 F.2d 239 (Temp. Emer. Ct. App. 1980), cert. denied, 451 U.S. 985 (1981).

Petitioner is mistaken in arguing (Pet. 11) that the imposition of personal liability on those who participate in regulatory wrongdoings "has no foundation in American jurisprudence." It is commonplace in tort law that the breach of a duty imposed by statute may be tortious, see generally Restatement (Second) of Torts § 874A (1979), and violation of price control

statutes is a textbook example of such tortious conduct, *id.* § 874A cmt. f, illus. 11. Similarly, it is commonplace in the law of corporations that a corporate officer or director who participates in a tort is personally liable even though the wrongful act is performed in the name of, or for the benefit of, the corporation. See generally 3A Fletcher, *Cyclopedia of the Law of Private Corporations* § 1135, at 290 (1994) ("Personal liability for the torts of officers does not depend on the same grounds as 'piercing the corporate veil,' that is inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporate organization. The true basis of liability is the officer's violation of some duty.") (footnote omitted).

Accordingly, there are many contexts, other than the former price control regulations, in which corporate officers have been held liable for violating statutorily imposed duties. See, *e.g.*, *Polo Fashions, Inc.* v. *Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir 1987) (president and sole stockholder held personally liable for willful trademark infringement); *United States* v. *Pollution Abatement Servs.*, 763 F.2d 133, 135 (2d Cir.) (directors and shareholders held jointly liable with corporation for violations of Rivers and Harbors Appropriation Act of 1899), cert. denied, 474 U.S. 1037 (1985); *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1144 (4th Cir. 1975) (corporate directors held jointly liable with corporation for violation of civil rights statutes).

Petitioner does not contest DOE's finding that he caused the regulatory violations at issue. Thus, the court of appeals correctly held that the remedial order issued to petitioner was authorized by 42 U.S.C. 7193(a), which permits DOE to issue such orders to

any "person [who] has violated any regulation" promulgated under the EPAA.

b. Contrary to petitioner's suggestion (Pet. 27-29), the court of appeals' decision does not conflict with this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), which reiterated that there is no general federal common law. The decision in *O'Melveny & Myers* involved the law to be applied when the FDIC asserts a cause of action under state law. *Id.* at 83; see also *Atherton* v. *FDIC*, 117 S. Ct. 666, 670-674 (1997) (state law applies when FDIC, acting as receiver, sues former officers and directors of failed federal savings association for negligence and breach of fiduciary duty). The court of appeals correctly held that *O'Melveny & Myers* does not support the application of state law in an enforcement proceeding by a federal administrative agency acting pursuant to a comprehensive statutory and regulatory scheme that imposes duties on corporate officers. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) ("This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.").

Based on Section 209 of the ESA and 42 U.S.C. 7193(a), DOE determined that an individual responsible for a violation of the former federal price controls is liable in restitution in order to restore "the status quo." *Tull* v. *United States*, 481 U.S. 412, 424 (1987) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946)). Such liability "is necessary to effective enforcement" of the federal statute and DOE's implementing regulations. *Sauder*, 648 F.2d at 1348; see also *Citronelle-Mobile*, 669 F.2d at 721 ("The primary underlying policy of the ESA is to insure effective

enforcement of the pricing regulations," and "restitution is appropriate and necessary to enforce compliance.") (internal quotation marks omitted). Accordingly, the court of appeals correctly determined that federal law governed this proceeding.

c. Petitioner argues (Pet. 22) that DOE improperly shifted the burden of proof to petitioner because "DOE attempted to force [petitioner] to prove he did not receive the overcharges." The court of appeals reviewed the extensive administrative record, however, and correctly determined that DOE had "made a *prima facie* showing that [petitioner] personally benefitted from the overcharges" (Pet. App. 24 (internal brackets omitted)), and that petitioner simply failed to offer any contrary evidence.[4] That factbound issue does not warrant this Court's review.

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[4] Petitioner similarly argues (Pet. 21) that "[i]t is totally illogical and a violation of the principles of the law of restitution to find [petitioner] liable for the full amount of [Houston's] overcharges with no proof that [petitioner] * * * received any of the overcharges." The court of appeals properly concluded, however, that petitioner did benefit from the overcharges. Pet. App. 24-26. The remedial order simply restored the status quo by requiring petitioner to refund the amount of the overcharges involved in the regulatory violations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1997